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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff,

vs.

APPLE INC.,

Defendant.

APPLE INC.,

Counterclaimant,

vs.

EPIC GAMES, INC.,

Counter-defendant.

No. 4:20-CV-05640-YGR

JOINT CASE MANAGEMENT STATEMENT

Date: October 19, 2020
Time: 9:30 a.m.
Courtroom: 1, 4th Floor (via Zoom)
Judge: Hon. Yvonne Gonzalez Rogers

Pursuant to the Standing Order for All Judges of the Northern District of California, Civil Local Rule 16-9, and the Court's Order of September 29, 2020 (ECF No. 103), Plaintiff and Counter-defendant Epic Games, Inc. ("Epic"), and Defendant and Counterclaimant Apple Inc. ("Apple"), together, the "Parties", individually, a "Party", by and through their undersigned counsel, hereby submit this Joint Case Management Statement in advance of the October 19, 2020 Case Management Conference.

1. JURISDICTION & SERVICE

The Parties agree that the Court has subject matter jurisdiction pursuant to the Clayton Antitrust Act, 15 U.S.C. § 26, and 28 U.S.C. §§ 1331, 1337 for Epic's claims. The Parties further agree that the Court has supplemental jurisdiction over Epic's state law claims

pursuant to 28 U.S.C. § 1367, and also has subject matter jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332 based on diversity of citizenship of Epic and Apple. Although Epic does not seek monetary damages, the amount in controversy exceeds $75,000.

The Parties agree that the Court has subject matter jurisdiction over Apple's counterclaims pursuant to 28 U.S.C. § 1332. The Parties further agree that the Court has supplemental jurisdiction over Apple's counterclaims pursuant to 28 U.S.C. § 1367, and also has subject matter jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332 based on diversity of citizenship of Epic and Apple. The amount in controversy exceeds $75,000.

The Parties agree that no issues exist regarding personal jurisdiction or venue, and that no Party remains to be served.

2. FACTS

EPIC'S STATEMENT: Epic's recitation of the facts will be brief given the Court's familiarity with this case after having heard Epic's motions for a temporary restraining order and preliminary injunction. Apple has a complete monopoly in two relevant markets: (1) the market for the distribution of apps compatible with the iOS to users of iOS devices (the "iOS App Distribution Market"); and (2) the market for the processing of payments for the purchase of digital content, including in-game content, that is consumed within iOS apps (the "iOS In-App Payment Processing Market"). Apple requires all app developers to agree that Apple's own App Store be the sole mechanism to distribute consumer apps on iOS and that its own payment processing tool, In-App Purchase ("IAP"), be the sole mechanism to process in-app purchases of digital content on iOS. This anti-competitive conduct harms app developers, consumers, and would-be competing app distributors and payment processing providers.

Apple's claims that the restrictions it imposes on developers are pro-competitive will not bear scrutiny. For example, if Apple is correct that the App Store is a "vital driver" of the "consumer appeal" of Apple's mobile devices, then the App Store could succeed in a competitive market; consumers and developers that valued the App Store's offering would choose to transact through the App Store. Apple's actions that *force* consumers and developers to use the App Store, and make it the *only* software distribution method on iOS, expressly prevent competition that

would spur further innovation and lower prices for app distribution. Likewise, if Apple is correct that IAP "provides extensive benefits to iPhone users", then IAP could succeed in a competitive market too. Instead, Apple *requires* developers and consumers to use IAP for the in-app purchase of digital content, again expressly preventing competition on various dimensions including payment processing, customer service, parental controls, privacy protection, and more.

Epic anticipates that the following factual issues, among others, will be disputed: (1) whether iOS App Distribution and iOS In-App Payment Processing constitute relevant antitrust markets, including in particular whether a monopolist in iOS App Distribution or in iOS In-App Payment Processing could profitably impose a small but significant non-transitory increase in price; (2) whether Apple has market power in either of those markets; (3) whether Apple's conduct has anticompetitive effects on app developers, consumers, and would-be competing app distributors and payment processing providers; and (4) whether Apple's justifications for its conduct are pretextual and/or can be achieved through less restrictive alternatives.

APPLE'S STATEMENT: Epic's Complaint and allegations are fatally flawed on the facts and law. Apple is not a monopolist in any relevant market. Competition is fierce at every level: for devices, platforms, and individual apps, and—as Epic's own experience shows—a market limited to "iOS apps" lacks any basis in reality. Epic distributes *Fortnite* on numerous mobile, PC, and game-console platforms. And to quote one of Epic's own employees, when it comes to *Fortnite*, iOS is "the smallest piece of the pie."[1]

The challenged policies are also demonstrably procompetitive. Apple's App Store maintenance and curation efforts—through which, among many other valuable services, it reviews every app and update—are a vital driver of the consumer appeal and business success of Apple's mobile devices and iOS apps. Employing hundreds of human experts covering 81 languages, Apple reviews around 100,000 apps per week to ensure they meet Apple's high standards for privacy, security, content, and quality. Apple's decision not to outsource the safety and privacy to

[1] *See* Declaration of Mike Schmid in Support of Apple's Opposition to a Preliminary Injunction ¶ 18, Dkt. 79 (Sept. 15, 2020).

third parties is legitimate and has helped make iOS the safest and most trusted mobile platform. The App Store and IAP are key features of this integrated iOS infrastructure that provides tremendous value to consumers and offers competitive advantages over alternative platforms because of its integrated nature, which has been a part of Apple's business model from the outset.

Epic also seeks to prevent Apple from collecting commissions on in-app purchases. Under Apple's business model—which has remained unchanged—developers like Epic contractually agree to pay a commission to Apple on digital purchases. This commission revenue allows Apple to continue providing developer tools, app review, marketing support, and a host of other valuable products and services to both app developers and end users. Apple's collection of a 30% commission does not turn it into a "payment processor" within some fictional market for "in-app payment processing." Apple's IAP is simply an efficient, practical, consumer-friendly way for Apple to collect the fees developers have agreed to pay. Moreover, IAP provides extensive benefits to iPhone users, including a secure and centralized billing method, while also relieving developers of potentially crushing administrative burdens.

Although *Fortnite* has been removed from the App Store, the app remains installed on millions of iOS devices worldwide. Epic has reaped and continues to receive millions of dollars in in-app purchases through the unauthorized external payment mechanism that it deceptively smuggled onto the App Store, allowing Epic to divert to itself sales commissions that rightfully belong to Apple. Apple has therefore served Epic with Counterclaims to hold Epic accountable, in both contract and tort, for its malicious and injurious practices.

3. LEGAL ISSUES

This case raises the following legal issues, among others:

Whether Apple's conduct in respect of the iOS App Distribution Market violates Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Whether Apple's conduct in respect of the iOS In-App Payment Processing Market violates Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Whether Apple's conduct violates California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*, and Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*.

Whether the contracts between Apple and Epic are valid and lawful.

Whether Epic breached the implied duty of good faith and fair dealing.

Whether Epic is liable in quasi-contract for unjust enrichment at Apple's expense.

Whether Epic is liable in tort for intentionally interfering with Apple's economic relationships with iOS consumers.

Whether Epic is liable in tort for conversion for misappropriation of Apple's possessory interest in specific sums of money.

4. MOTIONS

On August 24, 2020, the Court granted in part and denied in part Epic's motion for a temporary restraining order. (ECF No. 48.)

On October 9, 2020, the Court granted in part and denied in part Epic's motion for a preliminary injunction (ECF No. 118).

On October 2, 2020, Epic filed a motion for judgment on the pleadings. (ECF No. 113.) On October 5, 2020, pursuant to the Court's order (ECF No. 103), the Parties met and conferred regarding this motion but did not reach resolution. The Parties intend to complete briefing of the motion pursuant to Civil Local Rule 7.

5. AMENDMENT OF PLEADINGS

On September 29, 2020, the Court ordered that "[t]here shall be no amendments to pleadings without good cause and only upon motion to the Court in accordance with Rule 16". (ECF No. 104 ¶ 4.) At this time, the Parties do not anticipate seeking leave to amend their respective pleadings. Both Parties reserve the right to seek leave to amend for good cause and in accordance with Rule 16.

6. EVIDENCE PRESERVATION

The Parties confirm that they have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines") and that they have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this Action.

7. DISCLOSURES

The Parties will serve or have served their respective initial disclosures today, October 12, 2020.

8. DISCOVERY

A. Discovery to Date and Coordination

EPIC'S STATEMENT: Given Apple's accusations below, Epic sets forth here the facts relevant to (i) Epic's response to the third-party subpoenas served on it by Apple and the *Cameron* Plaintiffs, and (ii) Epic's efforts to advance discovery in this Action, including Epic's first production even before receiving Rule 34 requests from Apple.

i. *Cameron* Discovery

In March and April of this year, Apple and the *Cameron* Plaintiffs served third-party subpoenas on Epic. Epic served its Responses and Objections in May and June, and in June and July engaged in several meet-and-confer calls with each of Apple and Plaintiffs. Throughout this process, Epic explained that (i) it would require a supplemental Protective Order to protect certain of its most sensitive confidential information, (ii) it would not conduct custodial searches of ESI, but rather conduct a reasonable search for documents it had agreed to produce by asking individuals with relevant knowledge to identify such responsive documents, and (iii) it would conduct this search only after it had reached agreement with both Apple and Plaintiffs, so that it would not have to go back and do multiple collections and reviews. To move the process forward, on July 17, 2020, Epic provided Apple with a proposed supplemental Protective Order. Apple never responded to accept or counter Epic's proposal until after the September 28, 2020 preliminary injunction hearing. In the correspondence between Epic and Apple since the September 28 hearing, Epic has made clear that it would continue standing on its objections, but expects that its production in response to the *Cameron* subpoenas would be subsumed in its production in this Action, where Epic is a party.[2]

[2] Contrary to Apple's assertions below, *infra* at 14, Epic never "unilaterally suspend[ed] negotiations with Apple" or "told Apple to just wait a bit". Instead, Epic sought to engage with

Apple argues that "Epic has not 'completed its production of documents in response to the third-party' subpoena served by Apple in the *Cameron* action". This is wrong. Epic completed its production by the Court-ordered deadline of October 7, 2020. Apple's real complaint concerns the Responses and Objections served by Epic over four months ago. Pursuant to Fed. R. Civ. P. 45(b)(2)(B), Epic's Responses and Objections narrowed the scope of its production obligation in response to Apple's subpoena. Epic and Apple subsequently met and conferred, and Epic agreed to produce certain additional documents as to which it had originally objected. But Epic never waived its objections, and Apple never took any steps to challenge them. On October 7, 2020, Epic completed its production of documents it had previously agreed to produce. Epic never agreed in *Cameron* to forensically collect and review thousands or millions of ESI documents in response to Apple's subpoena, as Apple suggests below. Notably, Apple does not assert that Epic failed to produce documents within the scope of its Responses and Objections, as modified through subsequent meet-and-confer discussions. That is because Epic satisfied all such requests, and Apple never raised any dispute with respect to those objections. In short, Epic has complied with its obligations in *Cameron* and *Pepper*.

In any event, Epic has explained to Apple that its past objections in *Cameron* were made in its capacity as a third party. Epic is in the process of a new collection and production in this Action, and Epic has committed to making all documents produced in this Action available also to the parties in *Cameron* and *Pepper*. Epic is thus moving forward with all haste with party discovery in this Action that will dwarf the third-party discovery it had agreed to in *Cameron*. That should moot any claim Apple may have about the sufficiency of that third-party discovery.

ii. *Epic v. Apple* Discovery

On August 29, 2020, as Epic sought to begin discussions with Apple about discovery in this Action, Epic asked Apple for a "better understanding of the existing discovery in [*Cameron* and *Pepper*], such as the scope of Apple's document production and any scheduled or

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counsel for both Apple and the *Cameron* Plaintiffs in parallel, in an effort to coordinate the scope of its production and limit duplicative requests.

completed depositions" so Epic could review the current state of the discovery in *Cameron* and *Pepper* and use it to streamline its discovery requests to Apple. Apple did not respond. On September 17, 2020, Epic again asked Apple about discovery in *Cameron* and *Pepper*, specifically to provide "all document requests directed to Apple and Apple's responses thereto, interrogatories directed to Apple and Apple's responses thereto, any third party subpoenas that have been served and responses thereto, and any correspondence regarding the foregoing". Again, Apple did not respond.

On September 22, 2020, Epic and Apple met to confer about discovery in this Action. During that meeting, Epic proposed that the Parties exchange proposed custodian lists and asked again that as a first step, Apple provide Epic with the list of custodians Apple had agreed to in *Cameron* and *Pepper*. Apple again refused to disclose to Epic the list of custodians from whose files documents were produced in *Cameron* and *Pepper*, the document requests pursuant to which Apple's documents were produced in *Cameron* and *Pepper*, and other information about the scope of Apple's document production in *Cameron* and *Pepper*. Apple claimed that information about *Cameron* and *Pepper* discovery was irrelevant to discovery in this Action. It was not until October 7, 2020, that Apple changed course and finally agreed to produce to Epic all written discovery requests and responses from *Cameron* and *Pepper*, and committed to "provide Epic with all documents produced so far in *Cameron* and *Pepper*". [3]

Apple's suggestion below that it previously withheld these productions because the Court had not yet entered a protective order in this Action is inconsistent with its prior statements. Apple previously said it was withholding the information based on the argument that it was irrelevant to this case, not because of the lack of a protective order, and Apple did not raise the

[3] Apple now denies that it previously claimed the information about *Cameron* and *Pepper* discovery was irrelevant (*infra* at 11 n. 4), and asserts as proof its agreement, just last week, to produce that information. That proves nothing—other than that Apple has finally dropped its untenable position and now provided information it had long resisted providing. Notably, Apple does not deny that until October 7, it refused to produce these documents to Epic, despite Epic's repeated requests.

protective order issue at any time prior to yesterday (October 11, 2020), after Apple read Epic's portion of this Joint Case Management Statement.

Also on October 11, 2020, Apple announced that it was unilaterally imposing a condition on its re-production to Epic of the documents it had previously produced in *Cameron* and *Pepper*. Apple said it was re-producing those documents "with the understanding that Epic Games may not litigate the decisions made in [*Cameron* and *Pepper*] that led to these productions, including but not limited to scope of responsiveness, confidentiality determinations, and privilege assertions". There was no such understanding between Epic and Apple. Epic could not—and did not—agree to this condition, as it has no information about these unspecified "decisions", given Apple's repeated refusals to discuss the course of discovery in *Cameron* and *Pepper*. Epic will promptly review the material Apple has now produced and remains hopeful that the documents produced by Apple and third parties in *Cameron* and *Pepper* will allow for a more streamlined document discovery process in *Epic v. Apple*, potentially limiting the need for certain discovery from Apple and minimizing discovery disputes, thereby reducing the burden on the Parties, third parties, and the Court.

However, Apple has not yet produced any discovery specific to this Action. On September 24, 2020, Apple proposed a limited list of six custodians for this Action, four of whom Apple represented were not custodians in *Pepper* or *Cameron*. Apple has not yet produced any documents from the files of these individuals. Apple's list of six custodians is also facially deficient, as it does not include individuals on whom Apple repeatedly relied during the temporary restraining order and preliminary injunction motions, such as Steve Jobs, Apple's former CEO, or Tim Cook, Apple's current CEO. (*See* Dkt. No. 36 at 3, 4, 6; Dkt. No. 72 at 3, 4, 22.)

By contrast, on that same day (September 24, 2020), Epic proposed to produce documents from the files of 15 custodians. Epic is in the process of collecting and reviewing documents from the files of these custodians, and has already made an initial production of more than 16,000 pages from the files of Timothy Sweeney, Epic's CEO. Apple asserts, without basis, that Mr. Sweeney's "documents were cherry-picked"; they were not. Mr. Sweeney's documents were forensically collected, culled through search terms, and reviewed for relevance and privilege.

Just as it had provided Apple with a complete list of proposed custodians, Epic will provide Apple with full disclosure about the search terms it applies to the files of these custodians, and would expect Apple to do the same when it collects and reviews documents specifically for this Action. Moreover, in addition to the production Epic already made *prior to* any request by Apple, Epic anticipates making another meaningful production from the files of its proposed custodians by the end of this week, and fully expects to complete its document production by the deadline imposed by the Court.

APPLE'S STATEMENT:

i. Apple Already Has Provided Substantial Discovery

Apple has already made substantial progress on discovery. After the Court entered a stipulated Protective Order on October 2 (Dkt. 112), Apple provided Epic with the 3.6 million documents produced by Apple in *Cameron* and *Pepper*, as well as all written discovery requests and responses in those cases.[4] Apple produced these documents in good faith without waiting for a discovery request from Epic, partly in reliance on Epic's repeated representations to the Court that it would use discovery from the class action cases "efficiently," Aug. 24, 2020 Hr'g Tr. at 5, and "documents produced by Apple and third parties in *Cameron* and *Pepper* will allow for a more streamlined document discovery process," *see ante* at 8. Yet Epic's statement suggests that it already intends to relitigate the "responsiveness, confidentiality determinations, and privilege assertions" in the *Cameron* production, *see ante* at 10. Epic cannot have it both ways. To the extent that Epic attempts to use this case to relitigate discovery in the *Cameron* matter, the Court's expedited discovery schedule could be thrown into jeopardy.

In addition to producing to Epic all documents already produced in *Cameron*, Apple has also identified six custodians likely to have discoverable information specific to this case—two of whom are custodians in *Cameron* and *Pepper*, and for whom Epic has already

[4] Epic's statement alleges that "Apple claimed that information about *Cameron* and *Pepper* discovery was irrelevant to discovery in this Action." That is false, as evidenced by the fact that Apple has *already produced* all of the documents and discovery responses from those cases.

received custodial documents.[5] Apple has begun collecting documents from the four new custodians and refreshing its collection of documents from the two *Cameron* custodians so it will be in a position to produce documents when it receives Epic's document requests.

ii. Epic Has Produced Virtually No Discovery to Date

In contrast, Epic has taken an unserious and unproductive approach to discovery so far. Of most pressing concern, Epic has not "completed its production of documents in response to the third-party" subpoena served by Apple in the *Cameron* action months ago. *See ante* at 10. In fact, Epic has produced only a few hundred documents (most of which appear to be variations of the same form agreement), and has expressly refused to produce the vast majority of documents responsive to that subpoena, which comprised just nine requests that seek documents directly relevant to this case. Despite Epic's unreserved commitment to the Court that it would "make production with alacrity on *the materials that have been requested of us*," (PI Hrg Tr. 6:25-7:1), and the Court's September 29 Order that Epic "complete this production" by October 7 (Dkt. 104), Epic's production fell far short of Epic's promises and the Court's Order. Notably, Epic withheld documents responsive to all but two requests, and refused to produce ***any*** documents in response to Apple's request for documents about malware in games distributed through Epic's app marketplace, the security and privacy risks associated with Epic's direct distribution of *Fortnite* to users of Android mobile devices, and Epic's decision to make *Fortnite* available through Google Play.

[5] Epic's alleges that Apple's proposed custodian list is "facially deficient" because it includes neither Steve Jobs nor Tim Cook, "whom Apple repeatedly relied on during the temporary restraining order and preliminary injunction motions." Epic's statement mischaracterizes the facts. Apple's temporary restraining order and preliminary injunction briefs cite exactly two references with respect to its current and former CEO—Tim Cook's Statement before the U.S. House of Representatives Judiciary Committee, and an AppleInsider article quoting Steve Jobs. Both are publicly available to Epic, and neither supports the need for a custodial collection from Apple's highest executives. To the contrary, Apple's proposed custodian list includes all fact witnesses who submitted declarations in support of Apple's temporary restraining order and preliminary injunction briefs—including Philip Schiller, current Apple Fellow and former Senior Vice President of Worldwide Marketing, who is the executive most likely to have information relevant to this case.

Moreover, Epic's search for documents was utterly insufficient. Epic admits that its responsive production includes no ESI and instead that Epic "manually identified" a cherry-picked set of documents rather than doing an exhaustive search and production. This particularly unacceptable because Epic claims that it has been collecting documents, presumably including ESI, from 15 of its custodians.

Epic has tried to distract from these deficiencies by "voluntarily" producing electronically stored information from one custodian, Tim Sweeney. Epic has provided no information about this production, how it was created or what it contains, suggesting that these documents were cherry-picked and omit a significant amount of relevant materials.

There are no excuses for Epic's intransigence. Epic's objections to producing plainly relevant documents under Apple's subpoena were unfounded when it was a third party, and they are even more meritless now that Epic has chosen to engage Apple in expedited litigation on the very same issues presented in *Cameron* and *Pepper*. Epic's attempt to justify its plainly deficient production based on its unilateral objections as a third party in *Cameron* ignores that: (1) the Court has already entered a protective order in this case (Dkt. 112), and Epic has withdrawn the supplemental protective order terms it sought in *Cameron*; and, (2) the Court has already ordered Epic to produce documents responsive to Apple's subpoena (Dkt. 104).

Epic also misrepresents the history of the parties' meet-and-confers with respect to Apple's subpoena on Epic in the *Cameron* case. After Epic served its objections and responses to the subpoena, Apple immediately engaged Epic to meet and confer on Epic's objections, which were not acceptable to Apple. In the course of the parties' negotiations, Epic indicated that it would stand on objections to certain requests and provide limited responses to other requests, subject to objections, using a document search process that was plainly inadequate. Apple did not agree to either of these proposals and expressly said so to Epic in these discussions. But Epic indicated that it was unilaterally suspending negotiations with Apple until it could reach agreement with *Cameron* plaintiffs on the scope of Epic's responses to their subpoena. Apple repeatedly attempted to hasten the process by seeking to join Epic's discussions with *Cameron* plaintiffs, consistent with the Court's Order on Discovery Coordination. Epic rebuffed these efforts and told

Apple to just wait a bit—only to file suit against Apple before providing any responses to Apple's subpoena. Epic's claim that Apple never challenged or disputed the adequacy of Epic's response to Apple's subpoena is frivolous in light of the Parties' active negotiations over Epic's objections.

Epic's improper approach to the *Cameron* subpoena is not an encouraging sign that Epic will discharge its discovery obligations in good faith or that the parties will be able to meet the aggressive schedule sought by Epic. As the Court observed in its September 29 Order, Epic's failure to comply with its outstanding discovery obligations "could have an impact on the expeditious resolution of" this case. Apple continues to urge Epic to take its discovery obligations seriously and honor its representations to the Court by making the promised, complete production in response to Apple's subpoena. If Epic continues to refuse to do so, Apple will raise the issue with the Court.

B. Scope of Anticipated Discovery

EPIC'S STATEMENT: At this time, and subject to its intent to leverage discovery already taken in *Cameron* and *Pepper*, Epic expects to seek documentary and testimonial discovery from Apple regarding, among other things: (1) Apple's decision to adopt, not to adopt, modify or cancel any technical and contractual restrictions concerning iOS app distribution and in-app purchases (including payment processing) for digital content; (2) historical and projected revenues, costs and profitability for the App Store and in-app purchasing; (3) the relevant markets described in the Complaint and Apple's power in those markets, including any barriers to entry; (4) internal analyses of competition between iOS and other OSs and between iPhone/iPad and other devices; (5) historical and current policies, practices and pricing for the App Store and IAP, including all exceptions thereto; (6) security measures, threats or past breaches concerning iPhones/iPads, Macs, iOS, macOS, the App Store, IAP, or third party payment processing; (7) Apple's investment in the development of APIs, SDKs, any other developer tools, the App Store and IAP; (8) information about all prior instances where either a developer included or requested to include a payment method other than IAP in an app and Apple's response thereto; (9) Apple's practices and policies on the termination of developer accounts; (10) Epic or its products, including Apple's actual or contemplated response to the introduction of Epic direct pay

on iOS; (10) Apple's productions in governmental investigations and inquiries regarding App Store practices; (11) the effects of Apple's policies and practices on competition, innovation, app developers, consumers, app distributors and payment processing providers; and (12) any purported procompetitive justifications for Apple's conduct.

At this time, Epic also intends to seek documentary and testimonial discovery from non-parties, including developers who have dealt with Apple to distribute their app(s) through the App Store and distributors of software.

APPLE'S STATEMENT: Apple expects to serve Requests for Production, Interrogatories, and Requests for Admission on Epic in this case, seeking documentary and testimonial discovery from Epic regarding, among other things: (1) Epic's distribution of apps through the App Store and other platforms; (2) competition among app marketplaces, game platforms, games/apps, and game/app developers; (3) Epic's distribution of its products on platforms other than iOS; (4) the various tools, services, and benefits that Epic has received from Apple to help it develop apps for iOS and achieve success on Apple's platform; (5) Epic's business model, revenues, costs and profits; (6) Epic's development and implementation of its direct payment mechanism; (7) Epic's relationships with developers who distribute their products through Epic; and (8) Epic's allegations in this case.

Apple also intends to seek documentary and testimonial discovery from third parties, including, potentially, third-party game/app distributors and game/app developers. Apple also anticipates that third-party discovery will include Tencent Holdings, Ltd. and potentially other non-U.S. entities, which might take more time to complete.

C. Proposed Limitations or Modifications to the Discovery Rules

Depositions. Epic believes that relief from the limitation on the number of depositions set forth in Fed. R. Civ. P. 30(a)(2) is necessary and appropriate, but believes it is premature to set a precise limit on the number of depositions at this time. Apple believes that it is too early to tell if any relief from Rule 30(a)(2) is necessary.

The Parties agree to engage in reasonable efforts to coordinate discovery, including stipulating to the Court's January 2, 2020 Order Regarding Coordination of Discovery, subject to

reasonable modifications or adjustments necessary to ensure such procedures do not unfairly prejudice either Party.

The Parties agree that they should seek to achieve the maximum coordination of document and other discovery among the related cases where reasonably practical. To that end, Epic intends to produce all document it produces in any of the related cases in all the cases. In addition, the Parties agree that:

Document Subpoenas to Non-Parties. The Parties agree as follows with respect to non-parties producing materials in response to Fed. R. Civ. P. 45 document subpoenas in this Action. The issuing Party shall request that non-parties simultaneously produce materials to both Epic and Apple. If, notwithstanding such request, the non-party does not produce the materials to both sides, the issuing Party shall provide a copy of all materials to the other side within three calendar days after receipt of the materials from the non-party.

Authenticity Presumptions. The Parties agree that all documents produced by either Party or by non-parties from the non-parties' files shall be presumed to be authentic within the meaning of Fed. R. Evid. 901. If a party serves a specific good faith written objection to the authenticity of a particular document, the presumption of authenticity will no longer apply to that document. Any objection to a document's authenticity must be provided with (or prior to) the exchange of objections to trial exhibits. The parties will promptly meet and confer to attempt to resolve any such objection.

Service. Service of any documents not filed via ECF, including pleadings, discovery requests, subpoenas for testimony or documents, and expert disclosure shall be by email to all attorneys for the receiving Party then appearing on the ECF docket, at the email addresses listed thereon. In the event the volume of served materials is too large for email and requires electronic data transfer by file transfer protocol or a similar technology, or overnight delivery, the serving Party will telephone or email the other side when the materials are sent to provide notice that the materials are being served. For purposes of calculating discovery response times under the Federal Rules of Civil Procedure, electronic delivery shall be treated the same as hand delivery.

D. Report of Planned Stipulated E-Discovery Order

The Parties will file a Stipulated Electronically Stored Information (ESI) [Proposed] Order by October 26, 2020.

E. Current Discovery Disputes

There are no current discovery disputes that require relief from the Court. Apple states that if Epic does not immediately cure the substantial deficiencies in its production in response to Apple's *Cameron* subpoena, Apple will bring this dispute to the Court in the very near term. Epic refers to its statement in 8.a, above.

9. RELATED CASES

The Court has two related cases to this litigation: *Cameron et al. v. Apple Inc.*, Case No. 19-cv-03074-YGR (filed June 4, 2019), and *In re Apple iPhone Antitrust Litigation*, Case No. 11-cv-06714-YGR (filed December 29, 2011). *See* Related Case Order, *Cameron* Dkt. 107 (Aug. 19, 2020). In its October 6, 2020 order, the Court indicated that it was "interested in the potential overlap with the Related Matters" and instructed the Parties to meet and confer with counsel in *Pepper* and *Cameron*. Dkt. 116 at 3. The Parties in the related matters continue to meet and confer to explore coordination between the cases.

In addition, two new class action lawsuits have been filed against Apple: (1) *Pistacchio v. Apple, Inc.*, No. 3:20-cv-07034, filed in this Court on October 8, 2020, and (2) *Beverage, et al. v. Apple, Inc.*, No. 20-cv-370535, filed in the Superior Court of California on September 17, 2020. The Parties reserve their rights with respect to any potential motion to relate these actions to the above-captioned action.

10. RELIEF

EPIC'S STATEMENT: Epic seeks all appropriate injunctive and equitable relief, including that the Court: (1) issue an injunction prohibiting Apple's anti-competitive conduct and mandating that Apple take all necessary steps to cease unlawful conduct and to restore competition; (2) award a declaration that the restraints complained of in the Complaint are unlawful and unenforceable; (3) award any other equitable relief necessary to prevent and remedy

Apple's anti-competitive conduct; and (4) grant such other and further relief as the Court deems just and proper. (*See* Compl. at pp. 61-62 (Prayer for Relief).) Epic does not seek monetary relief in this litigation.

With respect to each of Apple's counterclaims, Epic requests that the Court: (1) enter judgment in favor of Epic and against Apple, and (2) deny the relief Apple requests.

APPLE'S STATEMENT: With respect to Epic's antitrust claims, Apple requests that the Court: (1) enter judgment in favor of Apple and against Epic, and (2) deny the relief Epic requests.

With respect to Apple's Counterclaims, Apple seeks all appropriate injunctive, equitable and monetary relief, including that the Court: (1) decree that Apple's contracts are enforceable and that, pursuant to those contracts, Apple has the right to terminate breaching developers and their affiliates; (2) decree that Epic is liable for breach of contract and the implied covenant of good faith and fair dealing and its tortious conduct, and that Apple can enforce contractual termination provisions against breaching developers and their affiliates; (3) award Apple compensatory and punitive damages, attorneys' fees, and interest; (4) order restitution and disgorgement of Epic's earnings, profits, compensation, benefits, and other ill-gotten gains; (5) enter a permanent injunction enjoining Epic and all acting in concert or participation with Epic from facilitating, assisting, or participating in the operation of an external payment mechanism in Epic's apps (including *Fortnite*), introducing further unauthorized external payment mechanisms into iOS apps, and/or removing IAP as an available payment mechanism for in-app purchases through any iOS apps; and (6) award any further relief the Court deems just and proper. (*See* Apple's Answer and Counterclaims, ECF No. 66 at 56-65 (Claims and Prayer for Relief).)

11. SETTLEMENT & ADR

At this time, the Parties do not believe that settlement is likely. The Parties have met and conferred regarding ADR, and determined that ADR would not assist in resolving the case at this time. The Parties, however, intend to stipulate to an ADR process in due course.

On October 12, 2020, the Parties filed their respective ADR Certifications.

12. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The Parties respectfully decline assignment to a magistrate judge for all further proceedings in this Action.

13. OTHER REFERENCES

The Parties agree that this case is not suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

14. NARROWING OF ISSUES

On September 28, 2020, the Court stated that it did not intend to bifurcate the trial. (Hr'g Tr. 100:19.)

On October 2, 2020, Epic filed a motion for judgment on the pleadings with respect to certain of Apple's counterclaims. (ECF No. 113.) Apple disputes the merits of Epic's motion and intends to file a response by the October 16, 2020 deadline.

In its October 6, 2020 Order, the Court said the Parties "should meet and confer and formulate recommendations to streamline trial issues and briefing, including whether briefing on certain legal issues should be staged in advance of the trial". (ECF No. 116 at 2.) As suggested by the Court, the Parties are amenable to pretrial briefing on certain legal issues. The Parties are continuing to meet and confer regarding this issue in advance of the October 19, 2020 conference.

15. EXPEDITED TRIAL PROCEDURE

The Parties agree that this case is not suitable for handling under the Expedited Trial Procedure of General Order No. 64.

16. SCHEDULING

On September 29, 2020 and October 6, 2020, the Court ordered dates for a schedule for this Action. (ECF Nos. 103, 104, 116.)

17. TRIAL

The Parties agree and the Court ordered that this case (including any claims and counterclaims) should proceed to a bench trial. (ECF Nos. 105, 116.) At this time, the Parties are unable to estimate the length of trial.

18. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Pursuant to Civil Local Rule 3-15, Epic filed its Certification of Interested Entities or Persons (ECF No. 3), which discloses that as of the date of filing, Tencent Holdings Limited owns more than 10% of Epic's stock, and that, other than the named parties, Tencent Holdings Limited, and Timothy Sweeney, there is no other person, firm, partnership, corporation, or other entity known by Epic to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

Pursuant to Civil Local Rule 3-15, Apple has filed its Certification of Interested Entities or Persons (EC No. 117), which discloses that as of the date of filing, Apple has no parent corporation, and no publicly held corporation owns 10% or more of its stock, and certifies that, other than the named parties, there is no other person, firm, partnership, corporation, or other entity known by Apple to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

19. PROFESSIONAL CONDUCT

The Parties confirm that all attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

Dated: October 12, 2020

CRAVATH, SWAINE & MOORE LLP

Respectfully submitted,

By: /s/ *Gary A. Bornstein*
Gary A. Bornstein

Attorneys for Plaintiff Epic Games, Inc.

Dated: October 12, 2020

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Cynthia Richman*
Cynthia Richman

Attorneys for Defendant Apple Inc.